In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 542.

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs

ESTATE OF GORDON A. STOUFFER, DECEASED,
MARK A. LOOFBOURROW, EXECUTOR,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 512.

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

ESTATE OF GORDON A. STOUFFER, DECEASED, MARK A. LOOFBOURROW, EXECUTOR,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Though, admittedly, the decision below is of great interest to the litigant taxpayers affected, neither this case nor No. 366 warrants review by this Court. That this is true is manifest from the Petition, here, and the Memorandum filed by the Solicitor General in No. 366. The cases present no important question of Federal law, nor does it appear that their decision necessarily conflicts with the decision of any other Court of Appeals. The suggested conflict is more apparent than real.

True, the decision below produced a different tax result from a division of property between husband and wife in a divorce case than the tax result which followed from decisions in the Second and Third Circuits which also involved property settlements in connection with divorce. On careful study of the decisions involved, it appears that these differences in result arose not from a conflict between

the circuits as to applicable legal principles, but rather from different conclusions which the courts drew from the facts with which they respectively were confronted.

The claim asserted by the Petition in No. 366, that the Court below violated accepted principles of judicial review, is based upon a rule of procedure which, because of congressional amendments, the effect of which have been recognized by this Court, has not been in force for more than ten years and must, therefore, be disregarded.

Therefore, despite the importance of the cases to the litigants, they present no question with which this Court should be concerned.[1]

STATEMENT OF THE CASE.

With a single exception respondent accepts petitioner's statement, as far as it goes. It is true that, at the time of the divorce between respondent's decedent (Gordon) and his wife (Ina Mae), the stock, *allegedly* covered by the option in question, had a fair market value of $400,000.00. It is inaccurate, however, to characterize the agreement entered into by Gordon and Ina Mae as one for "the surrender of the *valuable* option in return for the surrender by Ina Mae of her rights to support and maintenance and to share in Gordon's property at his death." (Pet. p. 4.)

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[1] "* * * it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head." *Layne & Bowler Corporation v. Western Well Works, Inc., et al.*, 261 U. S. 387, 393.

The terms of the agreement did not equate the surrender of the option by Gordon to the surrender by Ina Mae of her rights to support and maintenance. Rather, the agreement was one providing generally for division of all of their property interests between them. It included "the settlement and adjustment of any and all * * * rights whatever of either of the parties in and to the property of the other." (R. 14a.) The stock allegedly subject to option had been owned by Ina Mae for many years, therefore no transfer of the stock was involved. So far as concerns the alleged option, the agreement provided simply that *if* and to the extent that the option "might" give Gordon any right in the stock, such right would terminate as a part of the over-all division of property. (R. 17a, par. 4, Ex. 12-L.)

It is also inaccurate to describe the option as "valuable." Neither the Tax Court nor the Court of Appeals considered it necessary to pass on the validity of the option and neither did so. (Pet. p. 19.) The Court of Appeals found "it is impossible to tell *from the evidence in this case* what the fair market value of the option was." (Pet. pp. 19 and 20, emphasis supplied.) That the option had any value is questionable because a bona fide dispute existed between Gordon and Ina Mae with respect to its validity, with the reasonable possibility that it might be declared wholly invalid. (Pet. p. 19.)

ARGUMENT.

The only reasons asserted in the Petition here or in that filed in No. 366 for granting the writ are, first: that the decision below is in conflict with the decision of the Third Circuit in *Mesta*[2] and that of the Second Circuit in *Halliwell*;[3] and, second, asserted by the petitioner in No. 366 but not urged by the petitioner here, that the Court of Appeals violated accepted principles of judicial review in refusing to accept findings of fact of the Tax Court which were clearly erroneous. Neither ground is tenable.

A. NO SUBTANTIAL CONFLICT EXISTS BETWEEN THE DECISION OF THE SIXTH CIRCUIT AND THE MESTA-HALLIWELL RULE.

The Commissioner and the Solicitor General, whose responsibility it is to assert the importance of any question of Federal law or procedure improperly decided below and the adverse effect, if any, of the decision upon the administration of the Internal Revenue laws, filed the Petition here only "for protective purposes." Moreover, in his Memorandum filed in No. 366, the Solicitor General makes no claim that the Court below disregarded principles of judicial review when it rejected the findings of the Tax

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[2] *Commissioner of Internal Revenue v. Mesta*, 123 F. 2d 986 (C. A. 3d), certiorari denied 316 U. S. 695.

[3] *Commissioner v. Halliwell*, 131 F. 2d 642 (C. A. 2d) certiorari denied, 319 U. S. 741, decided *per curiam*, adds nothing to *Mesta* by way of analysis or exposition of the legal principle involved. Both cases involve property settlements entered into in contemplation of divorce. In both cases the husband transferred stock which had an established market value. In addition, in *Halliwell* the value of the stock was specified in the agreement between the parties and subsequently incorporated in the divorce decree.

Court and made its own findings as to the facts established by the evidence. Rather, he is content with the mild equivocation that "We disagree with this holding * * *. Nonetheless, we recognize that this issue is one confined to the *peculiar facts* of this case." (Memorandum for the Respondent in No. 366, p. 5, emphasis supplied.)

So far as concerns the alleged conflict, the Solicitor General and the Commissioner euphemistically describe it as "muted." (Memorandum for the Respondent in No. 366, p. 5.) Of course, a conflict which does not speak is no conflict at all.

The Solicitor General correctly describes the *Mesta-Halliwell* rule as one which "rests on the practical assumption that a man who gives property of a fixed value for an unliquidated claim receives his money's worth." [1] (Memorandum for the Respondent in No. 366, p. 3. It is only the recognition of the general application of this rule in tax matters that "is of considerable administrative importance." (Memorandum for the Respondent in No. 366, p. 3.) It follows that unless the Sixth Circuit has rejected "the practical assumption" of *Mesta* and *Halliwell* as a guide to decision of tax cases, its decisions, in practical analysis, do not conflict with those of the Second and Third Circuits.

In order to understand the effect of the decision below and its significance as a precedent in the Sixth Circuit, it must be read together with that Court's later decision in *United States v. General Shoe Corporation*, 282 F. 2d 9 (Memorandum for the Respondent in No. 366, p. 3). *General Shoe* was decided on authority of *International*

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[1] *Commissioner v. Mesta*, 123 F. 2d 986, 988.

Freighting,[5] a Second Circuit decision which, in turn, rests on *Mesta* and *Halliwell*. Clearly, the Sixth Circuit has not rejected the *Mesta* and *Halliwell* decisions insofar as they pronounce principles of law.

In *General Shoe*, where the Sixth Circuit did apply the *Mesta-Halliwell* rule, the Court commented on its failure to apply the rule in its decision in this case, and said, "In no respect do we believe there exists any real conflict."[6] Why? Because, said the Court: "How different are the facts * * *."[7]

In *Mesta* and *Halliwell* the operative facts were (1) the husband gave up property of "a fixed value" and (2) the property was given up in return for an identifiable though unliquidated claim of the wife for support and maintenance. Where similar operative facts (the exchange of a fixed value property for an identified consideration were shown to exist) as in *General Shoe*, the Sixth Circuit followed *Mesta* and *Halliwell*. Here, the Sixth Circuit reached a different result from that obtaining in *Mesta* and *Halliwell* because, from the particular evidence in this case, it found the operative facts diferent from those which controlled the *Mesta* and *Halliwell* decisions.

Here, the Court found that the property given up by the taxpayer husband had no fixed value but rather that "it is impossible to tell *from the evidence in this case* what the fair market value of the option was." (Pet. App. pp.

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[5] *International Freighting Corp. v. Commissioner*, 135 F. 2d 310 (C. A. 2d).

[6] Appendix to Memorandum for the Respondent in No. 366, p. 14.

[7] *Ibid*, p. 15.

19 and 20, emphasis supplied). Further, it found that, *under the evidence in this case,* it could not be said that the property transferred was exchanged for or equated to the wife's claim for support and maintenance, segregated from other motivations and influences which were not susceptible of evaluation.[8]

The failure of the Commissioner and Solicitor General to petition for review of the decision below until after compelled so to do by the action of petitioners in No. 366, indicates their agreement that it would be improper to attempt to force decisions, involving unique facts, into inexorable judicial formulas.[9]

Since the difference in judicial result was produced by differences between the cases in their facts and not in the legal principles announced, the Petition should not be

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[8] "*The evidence shows* that because of the inclusion in the proposed settlement of some 'emotional items,' it looked at one time as though the negotiations were going to blow up and that there were occasions when the negotiations appeared about to break down. Under such conditions, values are lost sight of, concessions are made, one does not expect or insist upon getting his money's worth for what he gives up." (Pet. App. p. 16, emphasis supplied.)

As this Court has said, "Perhaps no warning has been more repeated than that the determination of value cannot be reduced to inexorable rules. * * * At times, however, peculiar circumstances may make it impossible to determine a 'market value.'" *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U. S. 396 at 402.

[9] "And empiricism suggests sailing as close to the record of a particular case as possible. Only thus shall we avoid abstract pronouncements bound to distort or to be distorted by the case-by-case adjudicatory process especially appropriate in problems of this nature. Either lip-service will be paid such formulas while decisions are rooted in considerations outside them, or formulas not fitting practical circumstances will achieve impractical results." 338 U. S. 396, Mr. Justice Frankfurter, concurring, at p. 408.

granted on the grounds of conflict. *Wisconsin Electric Co. v. Dumore Co.*, 282 U. S. 813.

B. THE ALTERNATE GROUND ADEQUATELY SUPPORTS THE DECISION BELOW.

In the light of the specific language of Section 111(b),[10] the *sine qua non* of the *Mesta-Halliwell* rule is that the value of that which the wife exchanged, i.e., "the amount realized from the sale or other disposition of the property," for property given up by the husband, is to be measured by the value fixed for the husband's property. The Court below squarely held:

> "Even if we accept the ruling of the *Mesta* case that the fair market value of the release is the same as the fair market value of the option, it is impossible to tell from the evidence in this case what the fair market value of the option was." (Pet. App. pp. 19 and 20).

Although the Tax Court found that, by agreement of the parties, the option was valid and of a value equated to the value of the stock upon which petitioners in No. 366

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[10] "Internal Revenue Code of 1939:

"SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

(a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113(b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) *Amount Realized.*—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

"(26 U. S. C. 1952 ed., Sec. 111.)" (Pet. pp. 2 and 3.)

now claim it constituted a call, the Court of Appeals found to the contrary that there was "a bona file dispute existing between the parties with respect to the validity of the option, with the reasonable possibility that it might be declared invalid, * * *."[11]

The facts relied upon to support the alternate ground of decision are detailed in the opinion.[12] With respect to many of these facts, the Court said: "the evidence is uncontradicted."

The Solicitor General and the Commissioner express only a mild dissatisfaction with this holding, citing in support the testimony of Homer Marshman, a petitioner in No. 366.[13] Even this mild disagreement is further qualified by the statement that "Nonetheless, we recognize that this issue is one confined to the peculiar facts of this case," among which were the identity of the attorneys who served Ina Mae in the negotiations, their sequence of service and their personal interest or lack thereof in the results of such negotiations.[14] But whether or not the Court

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[11] Pet. App. p. 19.

[12] Pet. App. p. 19

[13] Memorandum for the Respondent in No. 366, p. 5.

[14] Ina Mae was originally represented by Thomas Herbert, presently a Judge of the Supreme Court of Ohio, and Charles Carr, who, at the time of the trial in the Tax Court, was a Judge of the Common Pleas Court of Cuyahoga County, Ohio. Although Judge Herbert and Judge Carr was associated together in Ina Mae's representation, the negotiations on her behalf were actually handled by Judge Carr. (R. 56a, 86a). Judge Carr worked on this matter from January, 1951, until some time in April, 1951. (Ex. 23, R. 30a-37a). About ten days before the agreement between Ina Mae and respondent was finally signed (R. 66a) Mr. Marshman, whom Ina Mae married later in 1951 (Stip. par. 27, R. 12a), and who is a petitioner in No. 366, first entered the negotiations on her behalf.

below was right or wrong in its determination of fact is not a question sufficient to invoke the certiorari jurisdiction of this Court.[15]

Since the decision below is adequately supported by an alternate ground, as to which no conflict or Federal question exists, a review of any alleged conflict between such decision and *Mesta* and *Halliwell* would not change the result reached by the Court below. This result must stand unless this Court should undertake a detailed examination of the evidentiary facts in order to determine whether the Court below properly performed a routine judicial responsibility. Such an administrative or managerial function falls outside the appropriate discretionary jurisdiction of this Court.[16]

C. THE COURT BELOW VIOLATED NO ACCEPTED PRINCIPLE OF JUDICIAL REVIEW.

Although the Solicitor General and the Commissioner make no claim that the Court below departed from accepted principles of judicial review and accept the fact that the decision below rests upon a valid alternate ground of decision, the petitioners in No. 366 claim that the Court of Appeals was not free to reject a clearly erroneous finding of fact on the part of the Tax Court, if the record contained any substantial evidence tending to support the Tax Court's finding. In support of this position petitioners in No. 366 cite four decisions of this Court, the last of

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[15] *Southern Power Company v. North Carolina Public Service Company, et al.*, 263 U. S. 508.

[16] *The Monrosa, et al. v. Carbon Black Export, Inc.*, 359 U. S. 180, 184.

which is *Dobson v. Commissioner*, 320 U. S. 489. (Pet. in No. 366, pp. 15, 16.) The difficulty with the position so asserted is that it no longer represents the law.[17]

Petitioners in No. 366 are plainly wrong in their assertion that the Court below "clearly exceeded its role as an appellate court * * * and has invaded the province of the Tax Court." Rather, in rejecting the finding of the Tax Court as clearly erroneous and making its own finding with respect to the existence of a bona fide dispute as to the validity of the option and the resultant impossibility of evaluating it, the Circuit Court was merely complying with the guidance and instructions of this Court.[18]

CONCLUSION.

The decision of the Court of Appeals is correct. It is not in conflict with the decision of any other court of appeals. The Court below transgressed no rule of appellate procedure, nor did it exceed its proper and appropriate jurisdiction in this respect. The apparent conflict, if any,

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[17] "'The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court * * * in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury * * *.' The last words first came into the statute through an amendment to § 1141(a) of the 1939 Code in 1948 (§ 36 of the Judicial Code Act, 62 Stat. 991). The purpose of the 1948 legislation was to remove from the law the favored position (in comparison with District Court and Court of Claims rulings in tax matters) enjoyed by the Tax Court under this Court's ruling in *Dobson v. Commissioner*, 320 U. S. 489. Cf. note 11, *supra*." *Commissioner v. Duberstein*, 363 U. S. 278, 4 L. ed. 1218, Footnote 13 at p. 291.

[18] A finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U. S. 364, 395.

between the decision below and the *Mesta* and *Halliwell* cases consists only of a difference in results because of differing appraisals of facts, and not from any conflict in the existence or applications of rules of law. The Solicitor General and the Commissioner are correct in their conclusion that under the foregoing circumstances this case does not offer an "appropriate vehicle" for the determination of any question by this Court.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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